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In The
Supreme Court of the United States
October Term, 1994

UNITED STATES

Appellant,

v.

RAY HAYS, et al.,

Appellees.

STATE OF LOUISIANA, ET. AL.

Appellants,

v.

RAY HAYS, et al.,

Appellees.

On Appeal from the United States District Court
for the Western District of Louisiana

REPLY BRIEF OF APPELLANTS, STATE OF LOUISIANA, ET AL.

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INTRODUCTION

Appellees vainly defend a decision the district court did not write, based on factual assertions appellees did not support with evidence below. The district court's decision is based on a fundamental legal error that appellees never seriously confront: the court erroneously held that the use of old District 8 as a model for drawing District 4, and the resulting physical resemblance between them, was legally *irrelevant* because the court would not presume that the old 8th District was constitutional. As the court stated, "the tradition of the past regarding the old eighth district" is not "binding on this Court, due to the

fact that the old eighth district was never challenged on constitutionality by any court in the United States." J.S. App. 16.

Instead of defending that holding, appellees seek to circumvent it by inventing arbitrary criteria according to which District 4 fails to qualify as a district "truly" modelled on the old 8th. This effort is unsuccessful, not only because it fails to address the real basis of the district court's ruling, but also because it disregards all the testimony at trial and is grounded on nothing more than appellees' *ipse dixit*. Part I.A. responds to those arguments and also to appellees' claim that Act 1 is constitutionally defective because it fails to maximize the use of whole parishes in drawing districts.

Appellees' other contentions fare no better. While arguing strenuously that any intentional creation of a black-majority district should subject a redistricting plan to strict scrutiny (Br. at 17-26), appellees also contend that this very holding was unimportant to the district court's decision. Hays. Br. at 34. Appellees' erroneous interpretation of *Shaw v. Reno*, however, is precisely the interpretation employed by the district court in striking down Act 1. Part I.B. responds to appellees' arguments on this point.

Appellees further contend, contrary to *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that only an actual finding of a violation of the Voting Rights Act should be sufficient to authorize a race-conscious redistricting plan (Br. at 39-40, 41), while arguing that the district court's similar erroneous statement of the governing law was not really the holding of the court. *Id.* at n. 16. They misstate the record in an attempt to argue that voting is not racially polarized in Louisiana, an uphill battle at best in a state with a 30% black population where no black candidate has been elected to a statewide office or to a majority-white congressional or legislative district in this century. Louisiana responds to these arguments in Part II. Before examining those points in detail, we wish to underscore the

central facts that are dispositive under any interpretation of the Constitution and Voting Rights Act. As the district court predicted in 1993 in *Hays I*, the Louisiana Legislature was able to draw a substantially more compact second majority-black district after Act 42 was invalidated. The Legislature was able to do so by using the old, 38%-black, 8th Congressional District as a model and starting point, creating a district with a 55% majority of black registered voters that resembles prior versions of the old 8th. As all witnesses confirmed, Act 1 also successfully satisfies Louisiana's non-racial redistricting objectives; indeed, no plan considered by the Legislature in 1994, whether containing two majority-black districts or only one, achieved a better correspondence with Louisiana's traditional regions than did Act 1. Hilliard Test., J.A. 84-85. The plan results in two out of seven districts that have majority-black populations, in a state that is 30% black in population. The alternative redistricting plan drafted by the district court itself proves that no congressional plan can be drawn in Louisiana that does not combine geographically dispersed populations, different media markets, and different regions of the state in a single district. Louisiana's redistricting plan, in sum, is a remarkably successful effort to balance the myriad factors relevant to congressional redistricting, and should not have been invalidated under any sensible interpretation of the Fourteenth Amendment.[1]

---

[1]It will not do to invoke Judge Wisdom's faith, Hays Br. 1-2, to condemn Act 1: "The Constitution is both color-blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Columbia L. Rev. 1060, 1076-78 (1991).

I. APPELLEES' ARGUMENTS FUNDAMENTALLY MISCONSTRUE THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT AND THIS COURT'S HOLDING IN *SHAW*.

A. The District Court Misconstrued *Shaw* in Declaring Act 1 "Bizarre."

The district court held that any resemblance between District 4 and the old 8th congressional district was legally *irrelevant* unless the state could prove the constitutionality of the old 8th. As we explained at pp. 20-21 of our Brief, this was clear error; the resemblance between District 4 and prior versions of the white-majority old 8th District is highly relevant under *Shaw*.

Appellees make little effort to defend the district court's holding in this regard, preferring instead to argue that District 4 is flawed because it is not "truly" modelled on the old 8th District. Hays Br. at 32. This effort fails, as appellees are completely unable to overcome the obvious visual correspondence between District 4 and the old 8th from 1967-92, and they offer nothing to refute the testimony of the many witnesses who uniformly confirmed that the 8th District *was in fact* used as the model for drawing the 4th. Indeed, the testimony established *not only* that the old 8th district was the basis for the demographer's work in drawing Act 1, but that Louisiana legislators in fact cited the resemblance between District 4 and the old 8th as a basis for supporting the plan during the legislative process leading to the adoption of Act 1. *See* testimony cited in La. Br. at 6 & n.8.

Appellees' arguments, accordingly, depend on setting up arbitrary tests, not supported by any testimony, to determine what should or should not "count" as a district modelled on the old 8th. Thus, they announce that any district "truly" modelled on the old 8th would include Rapides, Avoyelles, Pointe Coupe, West Baton Rouge, and Iberville parishes. Hays Br. at

32. But even if this arbitrary pronouncement were controlling, it would not assist appellees, because District 4 in fact *includes* some or all of four of those five parishes.

Straining further to find differences between District 4 and the old 8th, appellees complain that District 4 includes some parishes not previously included in the old 8th. Hays Br. at 32. But most of these new parishes, including De Soto, Red River, St. Martin, and Lafayette, had bordered previous versions of the old 8th, hardly making it remarkable that they would now be included in District 4.

By picking out an arbitrary set of criteria, any one of the various versions of the old 8th can be made to appear anomalous and not "truly" modelled on the other versions. For example, the 8th district had consistently included all or part of Vernon, Rapides, and Natchitoches parishes from 1965 through 1972; but in 1972, those three parishes were placed in three different congressional districts, with only a portion of Rapides still included in the 8th District. Pl. Ex. 3. Similarly, District 8 as it existed under the plan in effect from 1981 to 1992 contained the parishes of St. Helena and East Feliciana (two of the River parishes) that were not included in District 8 as that district existed from 1967-80. None of this means that the 8th District adopted in 1973 or in 1981 was not "truly" modelled on prior versions of the 8th, anymore than appellees' distinctions establish that District 4 was not "truly" modelled on those same prior versions.[2]

Appellees, like the district court, also incorrectly characterize Louisiana's argument concerning the significance of the old 8th district. They claim that Louisiana attempted to prove that District 4 was "race neutral" by comparing it to the old

[2]Contrary to appellees' assertion, the old 8th district from 1973-82 contained only 10 full parishes, not 12. See Pl. Ex. 3.

8th. Hays Br. at 11. Appellees then triumphantly point out that District 4 is not in fact "race neutral," thus allegedly proving that any reliance on the old 8th district is "pretextual." But Louisiana made no such argument. Louisiana has never denied that it intended to create a black-majority district, if it could do so in a reasonable manner consistent with its redistricting history. The use of the earlier, 38% black, 8th district as a model is relevant because it shows that the state endeavored to draw a majority-black district in a manner similar to districts employed in the past, precisely as *Shaw* instructs.

As Louisiana's principal brief explains, there are sound and compelling reasons to employ a standard that measures "bizarreness" under *Shaw* with reference to district configurations previously employed by the state itself. Appellees offer no plausible alternative. They do not even attempt to defend the district court's conclusion that District 4 is defective because it combines different religious groups and different crops in the same district. Their silence only confirms that the district court erred in judging District 4's constitutionality by reference to these subjective redistricting preferences.[3]

Appellees rely almost exclusively upon the splitting of political subdivisions to support their claim that Act 1 is "bizarre" under *Shaw*. Br. at 14, 28-30. We disposed of this argument at pp. 27-28 of our principal Brief, and only a few points deserve further comment. Indeed, in a state where parishes themselves need not be composed of contiguous territory,[4] and where the Mississippi River and Red River them-

[3]Indeed, far from defending the district court on this point, appellees now assert that under their reading of *Shaw*, a state *may not* "deliberately" create a predominantly Roman Catholic election district. Hays Br. at 24. This news will obviously be startling for cities such as Boston, New York, and Chicago, among others.

[4]St. Martin Parish has two geographically separate portions, divided by Iberia Parish.

selves divide many whole parishes, appellees' heavy reliance on parish splits is particularly unpersuasive.[5]

Appellees argue that District 4 is impermissible because it splits four "major cities," thus including four media markets in the district. But one of these cities, Baton Rouge, has been split between different congressional districts since 1982. Moreover, if the Louisiana Legislature has split the State Capitol between different congressional districts in the past, it is difficult to argue that splitting the smaller cities of Lafayette and Alexandria between different districts is an extraordinary step for the Legislature to take.

In terms of media markets, District 4 in Act 1 compares favorably with Louisiana's previous white-majority District 8, and the appellees presented no evidence to the contrary. During the 1980s, District 8 extended south to include the expensive New Orleans media market, as well as the Alexandria and Baton Rouge media markets. District 4 does not extend as far south and therefore does not require use of the relatively expensive New Orleans market. Moreover, under the district court's remedial plan itself, a candidate running in District 4 would also have to use several media markets to reach all of his constituents. The incorporation of several different "media markets" in one district thus is common to virtually every Louisiana congressional plan that has been employed or proposed, and certainly the difference between three media markets in the old 8th and four in District 4 represents nothing extraordinary.

---

[5]Dozens of congressional districts around the country are composed primarily of split counties. Indeed, this is true of most of the majority-white congressional districts attached to our Brief for comparative purposes, including the Massachusetts, New Jersey, New York, Virginia, and Washington districts. *See Congressional Quarterly's Politics In America 1994: The 103rd Congress* (P. Duncan, ed. 1994), at 709, 952, 1015, 1566, 1605.

Appellees' reliance on the racial composition of parish or city splits in Act 1 is also misplaced. The more appropriate focus is not on the racial composition of isolated portions of the district, but the racial composition of the resulting congressional districts themselves. Even with a black majority population in District 4, the congressional districts that border District 4 still range from 17.96% to 27.45% in black population. J.A. 179. Each of these allegedly "segregated" districts thus has a greater black population percentage than over 75% of the congressional districts nationwide.[6]

Other cases applying *Shaw* have upheld challenged congressional districts despite similar parish or city splits. In *Vera v. Richards*, 861 F. Supp. 1304, 1344 (S.D. Tex. 1994) (three-judge court), Juris. Statement filed, No. 94-805 (Dec. 1, 1994), the court upheld several of the challenged districts although it described those districts in precisely the same terms appellees would use to condemn District 4, noting disparities in the racial composition of split counties. 861 F. Supp. at 1325-1328 & n. 34, 1344-45.[7]

Under Act 1, five of the 12 split parishes in District 4

[6]1990 CPH-L-117, 1990 Census Population and Housing Profile: Congressional Districts of the 103rd Congress, Table 2.

[7]For example, District 28, an approximately 250-mile-long, majority Hispanic district, was upheld although its description included the following:

> While the part of Guadalupe County split into District 28 contained a combined 52.3% African American and Hispanic population, the portion split into District 21 — represented by Republican Congressman Lamar Smith — contained only 23.4% African-American and Hispanic population. Similarly, the part of Comal County split into Congressional District 28 contained 62.1% African-American and Hispanic population, but the portion put in Smith's district was only 10.6% African-American and Hispanic population.

861 F. Supp. at 1326 n.34.

brought more white population than black population into District 4. For example, the portion of Evangeline Parish included in District 4 was over 62% white and only 37% black, and the split portions of four other parishes included in District 4 are also majority white (Natchitoches, Rapides, St. Landry, and St. Martin). Pl. Ex. 4. Appellees simply choose to ignore the uncontradicted trial testimony that some of the irregularities in district boundaries are, in fact, attributable to one-person, one-vote considerations or political considerations rather than racial considerations.[8]

Majority-black District 2 in Act 1, whose constitutionality appellees no longer contest, was created by dividing Orleans Parish and Jefferson Parish so that most of the black population of those parishes is in District 2, leaving District 1 with a predominantly white population. Yet the appellees claim that any parish divisions which contribute to the creation of a black majority in District 4 are monstrous acts of racial "segregation." To the contrary, creation of the 4th District has the same impact as the creation of District 2: a greater integration of mi-

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[8]For example, the state's demographer, Glenn Koepp, pointed out that the lines drawn in the Alexandria area take in "a lot more than . . . just the minority areas"; that predominantly white portions of the city of Baker were placed in majority-black District 4; and that various heavily black precincts along the border of District 4 were placed in the adjoining majority-white District 6 rather than in District 4. J.A. 51. Representative Joseph Accardo, Jr., chair of the House of Representatives Committee on House and Governmental Affairs, also described in detail how "the shape of the boundaries in Lafayette and St. Landry parishes were influenced by nonracial factors," including efforts to preserve as much as possible Congressman Hayes' electoral base. State Ex. 16, J.A. 197. *See also* La. Br. at 27 & n.32.

Representative Accardo's description of the House's actions on April 20, 1994, which involved House members' *nonracial* objections to various amendments the Senate had added, also contradicts appellees' unsupported assertion that the Justice Department's letter dated April 20, 1994 was somehow the basis for Act 1's adoption. Hays Br. at 7-8.

norities into the political life of the State, under a plan that also satisfies the State's regional, political and other non-racial redistricting objectives.

B. This Court Should Reject Appellees' Unwarranted Extension of the Fourteenth Amendment to Render All Majority-Minority Districts Constitutionally Suspect.

Under appellees' interpretation of the Fourteenth Amendment, a redistricting plan is constitutionally suspect if the state admits that it deliberately sought to comply with the Voting Rights Act by drawing a majority black district.[9] Hays Br. at 25-26. Appellees argue that this is a salutary result because it will assure that legislatively enacted redistricting plans must undergo "the most 'searching judicial inquiry'" as a condition for federal court approval. Br. at 26 (quoting *Shaw*). In any state where compliance with the Voting Rights Act has been a prevalent issue in redistricting, the legislature's enactment of a redistricting plan will thus become little more than a dress rehearsal for the event of real importance in the redistricting process: the judiciary's examination and evaluation of the redistricting choices made by the legislature. As Louisiana's Brief explains, such a vision is wholly contrary to this Court's longstanding jurisprudence on states' authority to conduct redistricting, and *Shaw* certainly never intended to endorse such a view. La. Br. at 13-19.

Appellees argue that equal protection analysis should not take into account the commands of the Voting Rights Act, because that would be tantamount to construing the Constitution to avoid a conflict with the Voting Rights Act. Their argu-

[9]Appellees devote much of their Brief to the untenable argument that bizarre district shape is unimportant under *Shaw*, which they say establishes a requirement of color-blind redistricting. Hays Br. at 2; *id.* at 13 ("This case is not about the topology of unusually-shaped districts, but about the authority of a State to classify its citizens by race"); *id.* at 14, 21.

ment is a giant exercise in question-begging. If it is within Congress' power under the Fourteenth Amendment to prescribe anti-discrimination standards that are prophylactic and that make redistricting plans potentially unlawful when they have a racially disparate impact, then it cannot be a presumptive violation of the Fourteenth Amendment for the states to take intentional action to comply with those standards. Appellees have not argued that the Voting Rights Act is unconstitutional, and cannot persuasively defend an interpretation of the Fourteenth Amendment that depends upon that very assumption.

Appellees argue that even if their view of the Fourteenth Amendment is incorrect, the district court properly treated Act 1 as presumptively unconstitutional based on its holding that "the fundamental factor driving Act 1 was race" (J.S. App. 5). But this holding itself rests on a legally erroneous understanding of *Shaw* and the Fourteenth Amendment. The district court believed that the legislature's "specific intent" to create a black-majority district itself demonstrated a fundamentally race-driven, and therefore inherently suspect, redistricting process, a view that the district court stressed throughout the hearing on Act 1:

> THE WITNESS [Glenn Koepp, Senate demographer]: What we were doing was attempting to meet all of the criteria[.] [I]f, in fact, when I finished trying to draw that and there was no other way to put together a minority district other than a very bizarre way or if . . . it may derive serious gerrymandering in other areas, then I don't think — I know the legislature would not have adopted it, that type of plan.
>
> JUDGE WEINER: Everything you have just said in this statement presupposes an effort to get a second majority-minority district.

> THE WITNESS: That was one of the things we were doing.
>
> JUDGE WEINER:That's all I asked you and that's all Judge Walter asked you. J.A. 48.

The district court, in sum, believed that the very effort to determine if a second majority-minority district could be drawn consistent with other reasonable redistricting criteria demonstrated a fundamental racial intent that is inherently suspect. But the unreality of this standard is apparent. When Louisiana adopted Act 1, the State had just been through a trial on the legality of Act 42, after which the district court found that a "substantially" more compact majority-black district could have been drawn. Yet plaintiffs argue, and the district court agreed, that the Louisiana Legislature could not constitutionally create this substantially more compact majority-black district *unless it did so without specifically setting out to do so*. The Fourteenth Amendment simply does not impose such an incoherent rule on state redistricting efforts.[10]

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[10]Moreover, if the district court's decision on Act 1 were construed to have found that Louisiana subordinated all other redistricting goals to that of race, such a finding would, indeed, be clearly erroneous. *All* of the witnesses to testify on the subject pointed out that the state had balanced numerous other factors in drawing Act 1, and it was undisputed that no plan considered by the Legislature, whether it had two majority-black districts or only one, better reflected Louisiana's traditional regions than did Act 1. Hilliard Test., 7/21/94 p.m. Tr. 84-85, J.S. 84. As the chair of the House Reapportionment Committee stated, "The legislature, in enacting Act 1, determined that it better served the interests of all the state's citizens. Other plans that were introduced, such as House Bill 5 and other similar plans, were disproportionately skewed in favor of north Louisiana, an area that has lost population in the 1980's relative to the rest of the state." Declaration of Rep. Joseph Accardo, Jr., State Ex. 16, J.A. 196. The principal draftsman of Act 1 also testified that he would not have proposed a plan with a second majority black district if it could only be accomplished through a bizarre district configuration. Koepp Test. 7/21/94 a.m. Tr. 33-34, J.A. 48.

Appellees' proposed constitutional test suffers from fatal shortcomings. According to appellees, once a plaintiff establishes that race is "a motivating factor" in the drawing of a redistricting plan, the plan is subject to strict scrutiny unless the state establishes that "the same [plan] would have resulted even had the impermissible purpose not been considered." Hays Br. at 19, quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). But as we pointed out at pp. 15-16 of our Brief, when majority-minority congressional districts are created, the legislative record will almost always show a specific, deliberate intent to do so. Particularly in a state with a history of racial discrimination in the electoral process, many legislators will inevitably frame their support for a majority-black district in terms of achieving a measure of political fairness for a previously excluded minority. But if the legislature draws that district in a configuration similar to other, presumptively lawful white-majority districts, and in a manner that makes eminent sense for the state in terms of its other, non-racial redistricting objectives, *Shaw v. Reno* should not be read to impose a presumption of constitutional invalidity based on the legislature's subjective intent to create a black-majority district. Naturally, a different redistricting plan might have been created if the legislature had not attempted to create a black-majority district, but that begs the question of whether the challenged redistricting plan is in fact a reasonable plan. All of this demonstrates that appellees' "fallback" position — that race may be employed in redistricting, but only if it is not the "motivating" or "fundamental" factor in drawing a district — is not a fallback at all, but merely another way of saying that all intentionally created majority-minority districts are constitutionally suspect.[11]

[11] Although appellees rely heavily on *Arlington Heights*, that decision states that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of govern-

II. APPELLEES IGNORE SETTLED LAW IN ARGUING THAT ONLY AN ACTUAL FINDING OF A VIOLATION OF LAW WILL PERMIT STATES TO DRAW MAJORITY-BLACK DISTRICTS.

Appellees approvingly cite one description of strict scrutiny under the Equal Protection Clause as "strict in theory, but fatal in fact." Hays Br. at 34. Enthusiastically embracing this formulation, they argue that the creation of a majority-black district should be permitted only in the most limited circumstances: (1) "*after* a trial" at which an actual Section 2 violation has been found (*id.* at 40, emphasis original); or (2) after "federal authorities" (either the Justice Department or the District Court for the District of Columbia) have "compelled" the state to create a black-majority district under their Section 5 authority — a compulsion that will be present only if a state actually submits for preclearance a plan without a black-majority district, and draws a Section 5 objection. *Id.* at 39-40. Even in the latter case, appellees argue that the state should be required to second-guess the Attorney General's determination by presuming that it may be unconstitutional. *Id.* at 40.

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ment. Placing a decisionmaker on the stand is therefore 'usually to be avoided.'" 429 U.S. at 268 n.18 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Under appellees' proposed rule, by contrast, such inquiries will become commonplace, so as to determine the "motivating" or "fundamental" basis for the legislature's redistricting plan, and to assure that state legislators have not created districts with reference to the voting power of racial, ethnic or religious groups. Of course, the search for supposedly illicit group-based redistricting considerations conflicts with this Court's frequent observation that redistricting routinely involves the consideration of racial, ethnic, religious, and other group characteristics. *See Davis v. Bandemer*, 478 U.S. 109, 147 (O'Connor, J., concurring in the judgment). As we discussed at pp. 14-15 and n.16 of our Brief, the very structure and reasoning of *Shaw* establish that the *Washington v. Davis/Arlington Heights* line of cases is not dispositive of the constitutional claim asserted by the plaintiffs here.

Appellees could hardly propose a better recipe for destroying voluntary compliance with the Voting Rights Act while simultaneously depriving states of any practical means to avoid litigation over their redistricting plans. As we explained in our principal brief, the law is to the contrary. Indeed, appellees' arguments, if accepted, would establish that *Wygant v Jackson Bd. of Educ.* was wrongly decided, which is probably why appellees devote so little attention to that decision.

Appellees claim that permitting race-conscious state action in the absence of an actual violation of federal law would establish an unprecedented "good-faith" defense in constitutional cases. But this Court has already ruled in *Wygant* that a court is *not* required to "make an actual finding of prior discrimination based on the [state actor's] proof" before race-conscious action will be upheld. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment). This holding recognizes the practical reality that states will often be the front-line interpreters of federal anti-discrimination statutes, and that their compliance with anti-discrimination laws will be chilled if federal courts are too eager to second-guess a state's judgment as to the existence of a factual predicate for remedial action. *Id.* at 290 (O'Connor, J., concurring in part and concurring in judgment) (recognizing "the value of voluntary efforts to further the objectives of the law") (citation and internal quotations omitted).[12] As former Attorney General William French Smith stated in congressional hearings on the extension of the Voting Rights Act in 1982:

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[12]Indeed, in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), this Court approved a gender-based promotion decision although the District Court had found that gender was the determining factor in the decision and had found no actual past discrimination against women by the employer. 480 U.S. at 625; *see id.* at 659 (Scalia, J., dissenting). *Johnson* also expressly recognizes the concept of "breathing room" for voluntary efforts to assure compliance with anti-discrimination laws, *id.* at 645 (Stevens, J., concurring), the very concept appellees dismiss out of hand.

> [I]t is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature. That purpose was to encourage States and localities to bring blacks and other racial minorities into the mainstream of American political life.[13]

A. Section 2 Provided a Compelling Basis for Act 1.

Appellees trumpet the district court's finding that "'the State cannot clear the first *Gingles* hurdle', compactness." Br. at 46. But appellees, like the district court, totally disregard the case law establishing that districts satisfy *Gingles* 1 if they are not materially stranger in shape than other districts the state has drawn. La. Br. at 34 & n.40. Based on the previous configurations of the old 8th District, Louisiana had, at the very least, a firm basis for believing that District 4 could satisfy that standard. Appellees offer instead only Judge Walter's eyeball test: "It's not compact to the eye of this beholder."[14] The deficiencies of such a subjective test demonstrate precisely why the first *Gingles* factor is properly interpreted in light of the district configurations the state itself has employed. There is simply no good reason to impose a stricter

[13] *Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act*, 97th Cong., 2d Sess. 68-69 (1982).

[14] Appellees repeatedly invoke the "clearly erroneous" constraint upon appellate review of the district court's findings of fact (App. Br. at 14, 15, 28, 29, 30, 47), but they ignore what this Court made clear in *Gingles* itself: "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or finding of fact that is predicated on a misunderstanding of the governing rule of law.'" 478 U.S. at 79.

test of compactness for black majority districts than for white majority districts.[15]

Moreover, there can be no serious dispute that voting in Louisiana is highly racially polarized. Appellees state that the district court expressly rejected Dr. Richard Engstrom's testimony on racially polarized voting in its 1993 decision on Act 42, but this statement is untrue and, indeed, appellees supply no citation for it. At the 1994 hearing on Act 1, the court expressly informed the Government that it was not necessary for Dr. Engstrom to testify regarding racially polarized voting, because the court was already convinced that a district with a 55% black population was necessary to permit black voters an opportunity to elect a candidate of their choice. Tr. 7/21/94 p.m. at 19 (as Judge Shaw said, "When you strike gold on something, stop digging).[16]

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[15]There is no basis for appellees' assertion that the district court might have been referring to testimony of Dr. Sam Hilliard when it erroneously stated that the State's expert termed District 4 noncompact. Dr. Hilliard gave no such testimony, and in any event he testified for the United States, not for the State. Dr. Hilliard, like all the other witnesses to discuss the subject, confirmed that District 4 corresponds with prior versions of old District 8 and the Red River corridor (J.A. 75), that the Red River valley contains a large minority population (J.A. 86), and that Act 1's districts make sense from a regional perspective (J.A. 79-82). *See also* Declaration of Rep. Joseph Accardo, Jr., State Ex. 16, J.A. 196: "District 4, as contained in House Bill 11 and Act 1, is similar to but in many respects more compact than the old eighth congressional district"; Declaration of Dr. Olethia Davis, U.S. Ex. 11, J.A. 226-27 (District 4 is functionally compact based on ease of transportation and communication within the district and unifying features of Red River and Mississippi River).

[16]Appellees never acknowledge that they were required to bear the ultimate burden of proving the unconstitutionality of Act 1 by demonstrating that the state's evidence did not support the existence of a remedial purpose; they simply ignore the district court's error on this point. J.S. App. 6; *see* La. Br. at 40-41.

B. Section 5 Provided a Compelling Basis for Act 1.

Appellees argue that the prospect of a Section 5 objection by the Attorney General can never provide a compelling justification to draw a majority-minority district; only an actual Section 5 objection will suffice. Of course, this is flatly inconsistent with *Wygant*. Furthermore, in their discussion of Section 5, appellees simply ignore the decisional law that holds that a redistricting plan may reflect discriminatory intent even in the absence of retrogressive effect. La. Br. at 36.

CONCLUSION

Act 1 is not the "sinister" legislation that Justice Harlan condemned in his immortal dissent in *Plessy v. Ferguson*, 163 U.S. at 563 (1896). It is rather the balanced judgment of a majority-white Louisiana Legislature, conscious of the federal Voting Rights Act and *Shaw v. Reno*, to accommodate the opportunity for minority representation in the halls of the United States Congress.

In the words of Alexander Bickel, "each district carved out by an apportionment measure represents a choice and a prophecy."[17] Those who see in Act 1 the seeds of apartheid are wrong; there is no evidence supporting such a prophecy.[18]

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[17] Alexander M. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970s (N.W. Polsby ed. 1971) pp. 57, 63.

[18] *See* Bernard Grofman, Lisa Handley, & Richard G. Niemi, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 132 (Cambridge Univ. Press 1992):

> [T]here seems to be no factual basis for asserting that enforcement of the Voting Rights Act has led to an *increase* in racial polarization by making race a more salient feature of politics than it had been previously. Certainly Thernstrom (1987) provides no empirical evidence to support this claim.

A hundred years after *Plessy*, Louisiana firmly believes Act 1 is a constitutional choice open to its Legislature, resting on a competing prophecy:

> We have, since Madison, realized that people tend to act politically not so much as individuals as in groups; that they have opinions, preferences, and interests which vary in intensity and thus call for varying degrees of respect and forebearance on the part of others, even if those others constitute a majority . . . . We have realized, in short, that influence and even power should be distributed more widely than they would be in rigid adherence to the majoritarian principle . . . . We have striven, it may perhaps be said, not for a majoritarian, but for a participatory democracy, in which access to the process of government is continuously available to all groups. The sensible question to ask about any institution of government, therefore, is not whether it is purely majoritarian, but whether it tends to enhance minorities rule, whether it tends to include or to exclude various groups from influence, and whether, if it assigns disproportionate influence to some groups, they are the ones which are relatively shortchanged elsewhere, so that the total effect is the achievement of a balance of influence.

Alexander M. Bickel, *ibid* note 17 at 60-61.

This balance of influence, as Bickel saw it, *id.* at 72, applying Burke's "computing principle,"[19] is the precise constitutional aim of Act 1.

For the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted,

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11 April 1995

[19] Alexander M. Bickel, THE MORALITY OF CONSENT 142 (1975):

> But if we do resist the seductive temptations of moral imperatives and fix our eye on that middle distance where values are provisionally held, are tested, and evolve within the legal order — derived from the morality of process, which is the morality of consent — our moral authority will carry more weight. The computing principle Burke urged upon us can lead us then to an imperfect justice, for there is no other kind.